

CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Ariana Thomas	Team: Squad #13	CCRB Case #: 202106922	<input type="checkbox"/> Force	<input type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input checked="" type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input type="checkbox"/> Injury
Incident Date(s) Monday, 11/08/2021 10:30 PM	Location of Incident: § 87(2)(b) § 87(2)(b)	Precinct: 44	18 Mo. SOL 5/8/2023	EO SOL 5/8/2023	
Date/Time CV Reported Sun, 11/14/2021 12:01 AM	CV Reported At: CCRB	How CV Reported: On-line website	Date/Time Received at CCRB Sun, 11/14/2021 12:01 AM		

Complainant/Victim	Type	Home Address
§ 87(2)(b)	§ 87(2)(b)	§ 87(2)(b)

Subject Officer(s)	Shield	TaxID	Command
1. PO Nestor Lozano	18038	958843	044 PCT
2. PO Melvin Balbuena	06302	953656	044 PCT

Officer(s)	Allegation	Investigator Recommendation
A. PO Melvin Balbuena	Abuse: Police Officer Melvin Balbuena entered § 87(2)(b) in the Bronx.	§ 87(2)(g), § 87(4-b)
B. PO Nestor Lozano	Abuse: Police Officer Nestor Lozano entered § 87(2)(b) in the Bronx.	§ 87(2)(g), § 87(4-b)
C. PO Melvin Balbuena	Abuse: Police Officer Melvin Balbuena searched § 87(2)(b) in the Bronx.	§ 87(2)(g), § 87(4-b)
D. PO Nestor Lozano	Abuse: Police Officer Nestor Lozano searched § 87(2)(b) in the Bronx.	§ 87(2)(g), § 87(4-b)
E. PO Melvin Balbuena	Abuse: Police Officer Melvin Balbuena failed to provide § 87(2)(b) with a business card.	§ 87(2)(g), § 87(4-b)
F. PO Nestor Lozano	Abuse: Police Officer Nestor Lozano failed to provide § 87(2)(b) with a business card.	§ 87(2)(g), § 87(4-b)
§ 87(2)(g), § 87(4-b)	§ 87(2)(g), § 87(4-b)	§ 87(2)(g), § 87(4-b)
§ 87(2)(g), § 87(4-b)	§ 87(2)(g), § 87(4-b)	§ 87(2)(g), § 87(4-b)
§ 87(2)(g), § 87(4-b)	§ 87(2)(g), § 87(4-b)	§ 87(2)(g), § 87(4-b)
§ 87(2)(g), § 87(4-b)	§ 87(2)(g), § 87(4-b)	§ 87(2)(g), § 87(4-b)

Case Summary

On November 14, 2021, § 87(2)(b) filed this complaint online via the CCRB's website.

On November 8, 2021, at approximately 8:06 p.m., § 87(2)(b) called 911 to report that her 36-year-old brother, § 87(2)(b) was missing. Police Officer Melvin Balbuena and Police Officer Nestor Lozano, both of the 44th Precinct, arrived at § 87(2)(b) in the Bronx, and entered and searched § 87(2)(b)'s apartment, § 87(2)(b) (**Allegations A-B: Abuse of Authority, § 87(2)(g)** **Allegations C-D: Abuse of Authority, § 87(2)(g)** The officers failed to provide their business cards to § 87(2)(b) (**Allegations E-F: Abuse of Authority, § 87(2)(g)**), § 87(2)(g), § 87(4-b)

§ 87(2)(b) No arrest or summons resulted from this incident.

§ 87(2)(g), § 87(4-b)

§ 87(2)(b) There is no known video evidence in this case.

Findings and Recommendations

Allegation (A) Abuse of Authority: Police Officer Melvin Balbuena entered § 87(2)(b) in the Bronx.

Allegation (B) Abuse of Authority: Police Officer Nestor Lozano entered § 87(2)(b) in the Bronx.

Allegation (C) Abuse of Authority: Police Officer Melvin Balbuena searched § 87(2)(b) in the Bronx.

Allegation (D) Abuse of Authority: Police Officer Nestor Lozano searched § 87(2)(b) in the Bronx.

The 911 call audio (**Board Review 04**) revealed that § 87(2)(b) called 911 to report that she had not seen her 36-year-old brother, § 87(2)(b) who lived with her at § 87(2)(b) § 87(2)(b) in the Bronx, in a couple of days, and that he was not answering her calls or text messages. § 87(2)(b) said § 87(2)(b) did not suffer from any mental illness, had not previously gone missing, and that she had last saw him on November 3, 2021, at her apartment. A second 911 call audio (**Board Review 05**) revealed that § 87(2)(b) called 911 to report that she saw a police car from her apartment window, but that no officers came to her apartment and that she was waiting for officers to arrive downstairs. Event documents (**Board Review 06**) and police radio communications (**Board Review 07-09**) reveal that the above information was relayed to the responding officers via radio transmission.

§ 87(2)(b) testified that she met PO Balbuena and PO Lozano, identified via investigation, in the lobby of her building (**Board Review 10**). § 87(2)(b) stood on the third or fourth step of a staircase, while the officers stood at the bottom of the stairs in the lobby. She told them that § 87(2)(b) had been missing for three days and had not been answering calls or text messages. She said the super had a conversation with § 87(2)(b) before he left, and although she did not know what about, his attitude changed after that conversation. PO Balbuena and PO Lozano asked if they could go upstairs. § 87(2)(b) asked why they wanted to. The officers said they wanted to search her apartment and asked § 87(2)(b) if they could enter the apartment. § 87(2)(b) said, "I guess so. If you want to search, go ahead." During her CCRB interview, § 87(2)(b) said she felt like she had no choice but to let the officers search her apartment because they asked, and she wanted to respect them because they were officers. She led them upstairs and opened her apartment front door for them to enter. She and the officers entered the apartment. § 87(2)(b) described that as one walks through the front door of her apartment, they are in the living room. To the left of the living room is the kitchen and to the right of the living room is the door to § 87(2)(b)'s bedroom. To the right of

her bedroom is a closet and to the left is a bathroom. Straight passed this and down a hallway is another bedroom, which § 87(2)(b) and § 87(2)(b)'s children shared.

§ 87(2)(b) said in the living room, PO Balbuena asked if § 87(2)(b) suffered from any health issues. § 87(2)(b) said no, but that she was concerned since he had disappeared and no one could reach him. § 87(2)(b) remained in the living room while the officers searched the apartment. PO Balbuena entered § 87(2)(b)'s bedroom and opened the hallway closet, which was empty, while PO Lozano entered the other bedroom. PO Balbuena exited § 87(2)(b)'s bedroom and entered the other bedroom where PO Lozano was. She was unable to see what the officers did inside the bedrooms. They asked her to come to the second bedroom. There, she explained that her family stays with her, and that when they do, they sleep wherever they want, including the living room and in that bedroom. The officers asked if § 87(2)(b) clothes were still in the apartment. § 87(2)(b) said they were all gone. § 87(2)(b) saw the officers open doors and closets throughout the apartment but did not know if they moved or touched anything. They never said what they were looking for. § 87(2)(b) asked if they could file a report about § 87(2)(b). PO Lozano said they could take the report, but that if she wanted to file one, a supervisor would have to come to the apartment. This did not make sense to § 87(2)(b), so she told PO Lozano it was okay and that she would speak to her family members to try to find § 87(2)(b). She wished the officers good night and said she would not need the assistance of the 44th Precinct anymore. The officers did not show § 87(2)(b) any paperwork or ask her to sign anything.

PO Balbuena testified that upon their arrival, the officers immediately walked to the § 87(2)(b) of the building, where they knocked on § 87(2)(b)'s apartment door and she answered (**Board Review 11**). § 87(2)(b) did not meet them. At her apartment door, the officers asked § 87(2)(b) what was going on and she said her brother was missing. § 87(2)(b) did not provide the circumstances surrounding § 87(2)(b)'s disappearance. At that moment, PO Balbuena did not have any reason to believe § 87(2)(b) was in danger. After speaking to § 87(2)(b) for approximately two minutes, she said, "You can come inside," though PO Balbuena did not recall if this was in response to anything the officers said. Once inside her apartment, the officers informed § 87(2)(b) that, per NYPD procedure, they had to check to see if § 87(2)(b) was there hiding. The officers said, "Do you mind if we see where he lives or where he sleeps?" § 87(2)(b) said sure, pointed to the bedroom, and walked the officers there. Prior to this, § 87(2)(b) did not say anything to the officers that indicated § 87(2)(b) was there. PO Balbuena never told § 87(2)(b) that she could refuse to let the officers look around the apartment. As a matter of general NYPD procedure, officers are to start looking for a missing person from the location where he or she resides. The officers explained to § 87(2)(b) that they were looking around because that is how they start a missing person investigation. There was no mattress inside the bedroom, so it did not look like anyone had been sleeping there. There was nothing that suggested that § 87(2)(b) was in danger. PO Balbuena performed a brief visual look around; he denied touching anything or opening any closets. He did not enter any other room. He said he did not activate his BWC because the officers' actions did not constitute a search, for they did not open any drawers. PO Balbuena did not prepare any documentation regarding the brief visual look around because § 87(2)(b) willingly let the officers do that. After seeing that § 87(2)(b) was not there, the officers asked § 87(2)(b) if she wanted to file a missing person report, she said no, and the officers left.

PO Lozano's statement was somewhat consistent with PO Balbuena's (**Board Review 12**). He testified that after § 87(2)(b) opened her apartment door, PO Lozano only said, "Hello" and did not recall if PO Balbuena said anything before § 87(2)(b) said, "You guys can come inside." The officers then entered the apartment. In the living room, § 87(2)(b) said § 87(2)(b) worked at a bakery in Brooklyn and would leave early in the morning when he had to go to work. The officers asked where he stayed and where he slept. They asked if he slept in the living room. § 87(2)(b)

said he slept in the bedroom and led the officers there unprompted. PO Lozano and PO Balbuena never asked if they could look in § 87(2)(b) room. The officers entered the bedroom after § 87(2)(b) and briefly looked around. After observing that there was no bed or clothing, which suggested that § 87(2)(b) had moved out, the officers exited the bedroom. § 87(2)(b) led the officers to the bathroom unprompted, and the officers looked for signs or blood or trauma, which they did not see. The officers did not touch anything inside the apartment. PO Lozano did not verbally say anything before looking around the apartment and the officers did not initiate looking around the apartment, § 87(2)(b) did. When they returned to the living room, § 87(2)(b) provided the name of the bakery where § 87(2)(b) worked. On his department phone, PO Lozano searched for the bakery and called three or four phone numbers associated with it but never reached anyone. Throughout the incident, PO Lozano did not have any reason to believe § 87(2)(b) was in danger; if he had, he would have called a supervisor. PO Lozano said when officers respond to reports of missing persons, they do not engage their BWCs unless they perform a “Vertical” of the building, in which they check the roof, basement, and rear of the building, when it is reported that the missing person has a psychiatric history and may have committed suicide. The officers did not conduct a vertical search of this building because § 87(2)(b) said § 87(2)(b) did not have a psychiatric history.

A request for any Consent to Search forms related to this incident returned with negative results (**Board Review 13**), and PO Lozano and PO Balbuena did not document their search of § 87(2)(b)'s apartment in their Memo Books (**Board Review 24,25**).

Under the Fourth Amendment of the U.S. Constitution and Article I, §12 of the New York Constitution, officers may not search areas over which civilians maintain a reasonable expectation of privacy unless the civilians provide consent, or the officers prove exigent, or emergency circumstances necessitated their search (**Board Review 14, 15**). When an officer is seeking consent to search a person, vehicle, or home, §14-173 of the NYC Administrative Code requires that the officer (**Board Review 17**):

- §14-173(a)(1)—articulate, using plain and simple language delivered in a non-threatening manner, that the person who is the subject of the search is being asked to voluntarily, knowingly, and intelligently consent to the search, and explaining that the search will not be conducted if the person refuses to consent to the search;
 - §14-173(a)(2)— obtain consent without threats or promises of any kind being made to the individual;
 - §14-173(a)(3)— affirm that the individual understands the information communicated as per subsection (a)(1);
 - §14-173(a)(4)— refrain from conducting such search where consent has not been obtained; and
 - §14-173(a)(5)— utilize interpreter services as appropriate when seeking consent from an individual who has limited English proficiency.
- §14-173(b)(1)—If the officer is equipped with a BWC, the officer must record the aforementioned presentation of the consent to search and the individual’s response whether or not the civilian consents (notwithstanding the other situations whereby officers equipped with BWC are required to record interactions with the public).
 - §14-173(b)(2) –Regardless of the officer having a BWC, the officer must properly document the time, location, and date of such search and the apparent race/ethnicity, gender, age of the person who was the subject of the search and the officer’s name, precinct, and shield number.

NYPD Patrol Guide, Procedure 207-23 (**Board Review 18**), defines a missing person as a, “Person

missing from a New York residence and: a. Seventeen years of age or younger; or b. Cognitively impaired/developmentally disabled or disabled to the extent that hospitalization may be required or not capable of self-care or clear communication; or c. Sixty-five years of age or older; or e. Unique/unusual case; or f. Indicated an intention of committing suicide; or g. Missing under circumstances indicating unaccountable or involuntary disappearance.” Missing persons do not ordinarily include eighteen years of age or older who have left home voluntarily because of domestic, financial, or similar reasons. Upon receiving a complaint of a missing person, officers are to conduct an immediate search of the building or structure and immediate area to verify that such person is missing.

The investigation determined that § 87(2)(b) fit within the definition of a missing person, as defined by the Patrol Guide, because his disappearance was unaccounted for, and that the officers were procedurally to conduct a search of the immediate area to verify that he was missing. However, the investigation was unable to determine if the officers asked to enter and search § 87(2)(b)'s apartment prior to entering the apartment, as § 87(2)(b) alleged, or if she on her own invited them inside, as the officers said. Had § 87(2)(b) invited the officers inside, their entry into the apartment would have been justified, but had the officers asked to enter the apartment, they would have been required, under the Administrative Code, to inform § 87(2)(b) that her consent was voluntary and record the conversation on their respective BWCs, but they did not do either.

§ 87(2)(g)

Though much of the circumstances surrounding the entry and search remain in dispute, PO Balbuena acknowledged that once inside the living room of § 87(2)(b)'s apartment, the officers asked to see where § 87(2)(b) slept. Therefore, at that point, they were required, under the Administrative Code, to inform § 87(2)(b) that her consent to show them a different room of the apartment was voluntary, and to record the conversation on their respective BWCs, but they did not do either. PO Balbuena said he did not activate his BWC because he did not believe a visual inspection that did not involve opening any drawers constituted a search. PO Lozano said he did not activate his BWC because the officers only would have been required to do so had they conducted a vertical patrol of the building. § 87(2)(g)

Allegation (E) Abuse of Authority: Police Officer Melvin Balbuena failed to provide § 87(2)(b) with a business card.

Allegation (F) Abuse of Authority: Police Officer Nestor Lozano failed to provide § 87(2)(b) with a business card.

§ 87(2)(b) testified that the officers left approximately 10 minutes after they had arrived without providing § 87(2)(b) with their respective business cards.

PO Lozano testified that he never offered § 87(2)(b) a business card because no stop occurred, while PO Balbuena said he never provided § 87(2)(b) with a business card because she never asked for one.

Officers are required to offer a business card upon the conclusion of law enforcement activities, including home searches, except in cases when a summons is issued, or an arrest is made. NYPD Administrative Guide, Procedure 304-11 (**Board Review 23**).

As discussed above, PO Balbuena and PO Lozano searched § 87(2)(b)'s apartment to verify that § 87(2)(b) was not there. Despite the officers' statements that they did not provide their respective

business cards because no stop occurred and because § 87(2)(b) never asked for one, the Administrative Guide requires that officers provide their business card at the conclusion of a home search. § 87(2)(g)

§ 87(2)(g), § 87(4-b)

§ 87(2)(g), § 87(4-b)

Civilian and Officer CCRB Histories

- This is the first CCRB complaint to which § 87(2)(b) has been a party (**Board Review 19**).
- PO Lozano has been a member of service for seven years and has been a subject in five CCRB complaints and four allegations, none of which were substantiated. § 87(2)(g)
- PO Balbuena has been a member of service for nine years and has been a subject in one CCRB complaint and one allegation, which was not substantiated. § 87(2)(g)

Mediation, Civil, and Criminal Histories

- This complaint was not suitable for mediation.
- As of July 13, 2022, the New York City Office of the Comptroller has no record of a Notice of Claim being filed in regards to this incident (**Board Review 20**).
- § 87(2)(b)

Squad: 13

Investigator: _____ Inv. Ariana Thomas 08/01/2022
Signature Print Title & Name Date

Squad Leader:	_____	IM Laura Kastner	08/01/2022
	Signature	Print Title & Name	Date